

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WISCONSIN

BERNATELLO'S PIZZA, INC.,

Plaintiff,

v.

Case No: 16-cv-35

HANSEN FOODS, LLC,

Defendant.

**STATEMENT OF PROPOSED FACTS IN SUPPORT OF BERNATELLO'S
MOTION FOR A PRELIMINARY INJUNCTION**

Plaintiff, Bernatello's Pizza, Inc. ("Bernatello's"), submits the following proposed facts in support of its motion for a preliminary injunction.

PARTIES

1. Bernatello's Pizza, Inc. ("Bernatello's") is a Minnesota corporation with its corporate headquarters at 5625 West 78th Street, Suite B, Edina, Minnesota, 55439. (Declaration of Chad D. Schultz ("Schultz Decl."), ¶ 2.)

2. Hansen Foods, LLC ("Hansen") is a Wisconsin LLC with its principal place of business located at 930 Goddard Way, Green Bay, Wisconsin 54311. (Schultz Decl., ¶ 47.)

FACTS

3. Bernatello's Pizza, Inc. ("Bernatello's") is a family owned and operated business that has manufactured and distributed frozen pizza varieties since 1982. (Schultz Decl., ¶¶ 2 & 6.)

4. Bernatello's is in the business of producing and selling frozen pizza products to grocery stores, convenience stores, taverns, schools, club stores, food service providers, fundraising organizations, and other locations throughout Wisconsin, the Midwest and its other geographic markets. (Schultz Decl., ¶ 5.)

5. Bernatello's manufactures pizzas under its own brands, including BREW PUB, BELLATORIA, ORV'S, and ROMA. (Schultz Decl., ¶ 7.)

6. These brands vary in price point, quality of ingredients, and packaging to target different consumer groups within the frozen pizza market. (Schultz Decl., ¶ 7.)

7. Bernatello's distributes its frozen pizza varieties to various grocery and convenience stores throughout the Midwest region, including Wisconsin, Minnesota, Iowa, North Dakota, South Dakota, and Michigan. (Schultz Decl., ¶ 37.)

8. Additionally, Bernatello's BREW PUB and BELLATORIA brands are located in select regions throughout the United States through direct warehouse programs and club stores. (Schultz Decl., ¶ 38.)

9. Because frozen pizzas are relatively inexpensive products which are frequently purchased by consumers without detailed scrutiny of the goods and their brands, an average frozen pizza consumer is generally known to be an "impulse buyer." (Schultz Decl., ¶ 12.)

10. Bernatello's BREW PUB frozen pizzas are widely accessible and relatively inexpensive for consumers to obtain in the upper Midwest and in Bernatello's other markets. (Schultz Decl., ¶ 11.)

11. Bernatello's has different tiers of pizza organized by quality and price points, which range from more affordable to super-premium. (Schultz Decl., ¶¶ 13 & 14.)

12. More consumers have been purchasing restaurant pizza rather than frozen pizza, because they feel that store-bought pizza is not as good as restaurant pizza. (Schultz Decl., ¶ 18.)

13. The frozen pizza industry is competitive. (Declaration of Thomas Jacobsen ("Jacobsen Decl."), ¶ 20.)

14. The frozen pizza market is highly promotion-driven, and consumers tend to

migrate between brands that are on sale. (Schultz Decl., ¶ 16.)

15. As a frozen pizza manufacturer and distributor in the Midwest region, Bernatello's directly competes with other frozen pizza manufacturers and distributors in Wisconsin, Minnesota, Iowa, North Dakota, South Dakota, and Michigan. (Schultz Decl., ¶ 39.)

16. In October 2012, Bernatello's launched a new variety of frozen pizza branded as BREW PUB. (Schultz Decl., ¶ 19; Jacobsen Decl., ¶ 14.)

17. Bernatello's objective in developing BREW PUB frozen pizzas was to produce a super-premium brand that would "raise the bar" on the quality of frozen pizza. (Schultz Decl., ¶ 20.)

18. The initial brand ideation for BREW PUB was to communicate a place in the consumer's mind: a pleasant and relaxed locale and experience. (Schultz Decl., ¶ 20.)

19. Bernatello's also wanted to convey an impression of respite and relaxation through its branding of BREW PUB. (Schultz Decl., ¶ 20.)

20. Bernatello's marketing consultants believed that the growing popularity of the upscale club and pub scene provided a natural opening for a super-premium product that would resonate with consumers. (Jacobsen Decl., ¶ 13.)

21. Bernatello's goal was to develop BREW PUB as the "craft pizza" of frozen pizza, much like the craft beer industry, and establish a distinctive and fresh brand with a high level of consumer loyalty. (Schultz Decl., ¶ 21; Jacobsen Decl., ¶ 12.)

22. The BREW PUB label includes a design of a keg tap to further the "craft beer" and "pub" associations in consumers' minds. (Schultz Decl., ¶¶ 24- 25 & Ex. C.)

23. BREW PUB pizza was designed with unique ingredients and packaging distinct from its competitors to target consumers in the marketplace for a super-premium frozen pizza.

(Schultz Decl., ¶ 19.)

24. Bernatello's believed that consumers wanted better quality frozen pizza and sought to develop a pizza—BREW PUB—that would compete with restaurant quality. (Schultz Decl., ¶¶ 17-18 & Ex. B.)

25. Bernatello's marketing team developed unique product characteristics related to product quality and packaging to position BREW PUB as a super-premium frozen pizza product and differentiate BREW PUB from other frozen pizza varieties. (Schultz Decl., ¶ 22.)

26. The retail price of the BREW PUB pizza ranges from \$10.99 regular price to \$5.99 on "hot promotion." (Schultz Decl., ¶ 19.)

27. BREW PUB is produced with high quality, premium ingredients, including, among others, premium large sausage nuggets, premium sliced mushrooms, and premium roasted vegetable strips. (Schultz Decl., ¶ 23.)

28. BREW PUB also contains more than a half pound of wide-dimensioned, thickly shredded real Wisconsin mozzarella cheese. (Schultz Decl., ¶ 23.)

29. The cheese on a BREW PUB pizza is placed over the other toppings. (Schultz Decl., ¶ 23.)

30. BREW PUB pizzas are manufactured in twelve varieties in the multi-serve line and five varieties in the single serve line, most of which include premium toppings to complement the high quality Wisconsin cheese. (Schultz Decl., ¶ 27.)

31. BREW PUB ingredients were selected through an internal test panel. (Schultz Decl., ¶ 27.)

32. Additional features related to BREW PUB's packaging were developed and adopted to differentiate BREW PUB frozen pizza from other frozen pizzas in the market.

(Schultz Decl., ¶ 24 & Ex. C.)

33. Each BREW PUB pizza is sealed in clear wrap with a small, circular label on the top center of the pizza known as “bullseye” packaging. (Schultz Decl., ¶ 24 & Ex. C.)

34. The bullseye packaging provides consumers with a visual on the quality and quantity of BREW PUB’s ingredients. (Schultz Decl., ¶ 24 & Ex. C.)

35. In addition, this packaging was designed to give BREW PUB frozen pizzas a homemade tavern-style feel targeting a “craft pizza” look. (Schultz Decl., ¶ 24 & Ex. C.)

36. The bullseye packaging also differentiated BREW PUB from other national brands that carton (that is, box) premium and super-premium brand frozen pizzas. (Schultz Decl., ¶ 24 & Ex. C.)

37. Bernatello’s produces its BREW PUB pizza with a label having separately distinguishable BREW aspects, i.e. BREW PUB, and/or BREW PUB PIZZA, and/or BREW PUB PIZZA and Design. (Schultz Decl., ¶ 8.)

38. Bernatello’s owns federal trademark registrations and applications pertaining to the BREW PUB pizza it produces, including at least the following: BREW PUB PIZZA (U.S. Registration No. 4,373,576), BREW PUB PIZZA and Design (U.S. Registration No. 4,431,990), BREW PUB (Application Serial No. 86/978,114), IT’S BREW TIME (Application Serial No. 86/870,938), and BREW (Application Serial No. 86/838,514) (“BREW trademarks”). (Schultz Decl., ¶ 9 & Ex. A.)

39. Some or all of the BREW trademarks have been used exclusively and continuously throughout the Midwest region of the United States at least as early as October 23, 2012. (Schultz Decl., ¶ 10.)

40. At the time BREW PUB frozen pizza entered the market, it was the only frozen

pizza utilizing the term BREW in its brand name. (Schultz Decl., ¶ 26; Jacobsen Decl., ¶ 24; Declaration of Alan Alden (“Alden Decl.”), ¶ 13; Declaration of Michael Gaetz (“Gaetz Decl.”), ¶ 16.)

41. Based on research by Bernatello’s marketing consultants, a customer who hears of a BREW type of frozen pizza product will associate the product with BREW PUB due to the quality of the BREW PUB product and strength of the brand. (Jacobsen Decl., ¶ 18; Alden Decl., ¶ 13.)

42. Bernatello’s has directed extensive advertising and marketing strategies to make its BREW trademarks well known and recognized throughout the Midwest and other geographic markets as connected to its BREW PUB pizza. (Schultz Decl., ¶ 35.)

43. Beginning in 2012 and through December 31, 2015, Bernatello’s has spent a total of \$3,920,486 on advertising and marketing the BREW PUB brand. (Schultz Decl., ¶ 31.)

44. Over the last 3.25 years, Bernatello’s has spent the following amounts on advertising and marketing the BREW PUB brand annually: \$45,559 in 2012; \$1,303,031 in 2013; \$1,181,532 in 2014; and, \$1,390,364 in 2015. (Schultz Decl., ¶ 32.)

45. Based on more than \$3.9 million Bernatello’s has spent on marketing and advertising, the growing presence of BREW PUB in the marketplace, and ever-increasing sales figures, Bernatello’s has established a strong association in the frozen pizza market between the term BREW and its BREW PUB pizza. (Schultz Decl., ¶ 34.)

46. The BREW PUB brand has grown in recognition and association among frozen pizza consumers. (Schultz Decl., ¶ 33 & Ex. F.)

47. The success of BREW PUB pizza tends to indicate that customers associate BREW PUB pizza with high quality ingredients and recognize the brand through Bernatello’s

many advertising and marketing efforts. (Alden Decl., ¶ 14; Jacobsen Decl., ¶¶ 18-21.)

48. Bernatello's undertakes extensive efforts and significant spending in the advertising and marketing of its BREW PUB brand, including efforts and dollars spent for creation and purchase of advertisements, event sponsorships, in-store promotions, and other marketing efforts. (Schultz Decl., ¶ 29 & Ex. D.)

49. One specific advertising and marketing effort unique to BREW PUB in the super-premium market has been the use of an oven-equipped trailer marked with BREW PUB's brand to cook and serve BREW PUB pizza at various locations and events. (Schultz Decl., ¶ 30 & Ex. E.)

50. As of 2012, all of the super-premium pizzas in the United States were of limited, localized distribution. (Jacobsen Decl., ¶ 16.)

51. BREW PUB was the first super-premium pizza in the United States offered on a regional basis to the upper Midwest. (Jacobsen Decl., ¶¶ 16-17, Ex. A.)

52. Bernatello's is now the top supplier of frozen pizza in the Minnesota and Wisconsin markets.¹ (Schultz Decl., ¶ 40 & Ex. G.)

53. Bernatello's primary means of distribution is with its own Direct Store Delivery ("DSD") system. (Schultz Decl., ¶ 37.)

54. The DSD system consists of 52 truck routes and a sales team of 112. (Schultz Decl., ¶ 37.)

55. This DSD system distributes primarily to grocery stores in Wisconsin, Minnesota, the Upper Peninsula of Michigan, Iowa, North and South Dakota. (Schultz Decl., ¶ 37.)

56. Bernatello's pizzas are sold in over 2,100 DSD locations. (Schultz Decl., ¶ 37.)

¹ According to AC Nielsen, a global marketing research firm, Bernatello's has the first and/or second largest dollar market shares by company for the frozen pizza market. (Schultz Decl., ¶ 40 & Ex. G.)

57. Bernatello's also utilizes distributors such as Trimart, U.S. Foods, Holiday Wholesale, Power Play, Englehart, Upper Lakes, and Barnes, among others, that operate in and around Bernatello's current DSD System. (Schultz Decl., ¶ 38.)

58. These distributors focus primarily on small format businesses (*e.g.*, convenience stores, taverns, restaurants, and hotels) and also fulfill distribution to grocery stores at the outer boundaries of Bernatello's DSD system. (Schultz Decl., ¶ 38.)

59. In addition, the BELLATORIA and BREW PUB brands are located in select regions throughout the United States through direct warehouse programs and club stores. (Schultz Decl., ¶ 38.)

60. With the distributor and direct warehouse programs there are over 1,500 estimated additional locations for the brands. (Schultz Decl., ¶ 38.)

61. As a frozen pizza manufacturer and distributor in the Midwest region, Bernatello's directly competes with other frozen pizza manufacturers and distributors in Wisconsin, Minnesota, Iowa, North Dakota, South Dakota, and Michigan. (Schultz Decl., ¶ 39.)

62. Bernatello's has sold millions of BREW PUB frozen pizzas under the BREW trademarks. (Schultz Decl., ¶¶ 35-36.)

63. Since Bernatello's BREW PUB pizza entered the marketplace in October 2012, its sales have steadily increased each year, as follows:

Year End	Quantity	Sales
2013	2.4M	\$12.8M
2014	4.8M	\$24.6M
2015	7.8M	\$39.8M

(Schultz Decl., ¶ 36.)

64. From September 2014 to September 2015, Bernatello's BREW PUB pizza ranked first among all frozen pizza brands in the Minneapolis, Minnesota market selling 2,543,052 units totaling \$13,992,719 in sales. (Schultz Decl., ¶ 41 & Ex. H.)

65. From September 2014 to September 2015, Bernatello's BREW PUB pizza ranked second among all frozen pizza brands in the Milwaukee, Wisconsin market selling 849,653 units totaling \$5,044,560 in sales. (Schultz Decl., ¶ 42 & Ex. I.)

66. From September 2014 to September 2015, Bernatello's BREW PUB pizza ranked first among all frozen pizza brands sold in Lunds & Byerlys grocery store selling 240,975 units totaling \$1,273,068 in sales. (Schultz Decl., ¶ 43 & Ex. J.)

67. From September 2014 to September 2015, Bernatello's BREW PUB pizza ranked fourth among all frozen pizza brands sold in the Roundy's Supermarkets selling 400,612 units totaling \$2,489,206 in sales. (Schultz Decl., ¶ 44 & Ex. K.)

68. From September 2014 to September 2015, Bernatello's BREW PUB pizza ranked first among all frozen pizza brands sold in Cub Foods selling 1,359,747 units totaling \$7,214,386 in sales. (Schultz Decl., ¶ 45 & Ex. L.)

69. From September 2014 to September 2015, Bernatello's BREW PUB pizza ranked second among all frozen pizza brands sold in Piggly Wiggly grocery store selling 481,221 units totaling \$3,149,369 in sales. (Schultz Decl., ¶ 46 & Ex. M.)

70. Hansen Foods, LLC ("Hansen") also manufactures frozen pizza for distribution in the Midwest region. (Schultz Decl., ¶ 47.)

71. Hansen previously produced a super-premium frozen pizza branded BIG BEN and was in direct competition with Bernatello's BREW PUB super-premium frozen pizza. (Schultz Decl., ¶ 47; Alden Decl., ¶¶ 17-18.)

72. Hansen uses identical channels of trade for selling its frozen pizza products as are used by Bernatello's. (Schultz Decl., ¶¶ 5, 47, 54, 59 & 64.)

73. Hansen's pizzas are sold in the same grocery stores and marketed to the same consumers as Bernatello's pizzas. (Schultz Decl., ¶¶ 50 & 54; Alden Decl., ¶¶ 8 & 17.)

74. Hansen rebranded its BIG BEN super-premium pizza as BREWHAUS after it pulled the BIG BEN brand from the market, and after Bernatello's BREW PUB pizza was established as the top super-premium frozen pizza seller in the Midwest region. (Alden Decl., ¶ 18 & Ex. A; Schultz Decl., ¶¶ 36, 40, 48-50 & Ex. G & N.)

75. In Milwaukee, Wisconsin, BIG BEN's sales plummeted from \$156,714 in 2013 to \$31,742 by 2015. (Schultz Decl., ¶¶ 48-49 & Ex. N.)

76. Hansen's BREWHAUS frozen pizza is also marketed as a super-premium pizza with estimated retail value of \$10.99. (Schultz Decl., ¶ 52.)

77. BREWHAUS is also produced with wide-dimensioned, thickly shredded cheese placed on top of premium ingredients and "bullseye" packaging. (Schultz Decl., ¶ 52.)

78. Hansen's has utilized an oven-equipped trailer to advertise and serve its BREWHAUS pizza. (Schultz Decl., ¶¶ 30 & 53, Ex. E & Ex. P.)

79. Hansen has very recently started selling BREWHAUS frozen pizzas in Wisconsin and Michigan. (Schultz Decl., ¶ 54.)

80. Hansen's BREWHAUS pizzas are being distributed to at least the following grocery stores that also sell Bernatello's BREW PUB pizza: Woodman's, Festival Foods, Nilssen's Baldwin Wisconsin, and Marketplace Hayward and Rice Lake, Wisconsin. (Schultz Decl., ¶ 54.)

81. After BREW PUB achieved success in the Midwest frozen pizza market, Hansen

developed another frozen pizza utilizing the BREW brand: BREW TIME pizza. (Jacobsen Decl., ¶¶ 16-17; Schultz Decl., ¶ 56 & Ex. Q.)

82. Hansen's BREW TIME frozen pizza is also marketed as a super-premium pizza, utilizing thickly shredded cheese placed atop premium ingredients and "bullseye" packaging. (Schultz Decl., ¶¶ 56-57 & Ex. Q.)

83. The label of Hansen's BREW TIME pizza includes what appears to be a keg tap and the statement "contains over 1/2 pound of Real Wisconsin Cheese." (Schultz Decl., ¶ 58.)

84. Hansen's BREW TIME pizza has been sold as a control brand to Cash Wise/Coborn's who operates over 37 grocery stores in Wisconsin, Minnesota, North Dakota and South Dakota. (Schultz Decl., ¶ 59.)

85. Bernatello's BREW PUB frozen pizza is also currently sold in all Cash Wise/Coborn's and is ranked first among all frozen pizza brands sold at Coborn's/Cash Wise. (Schultz Decl., ¶ 59; Declaration of Trent Midas ("Midas Decl."), ¶ 7 & Ex. A.)

86. Hansen's BREW TIME pizza is being offered through Topco Associates, LLC ("Topco"), and Topco provides procurement, quality assurance, packaging and other services exclusively for its member-owners, which include supermarket retailers, food wholesalers and foodservice companies. (Schultz Decl., ¶ 60.)

87. Hansen's BREW TIME pizza is distributed through Topco's members and/or member distributors including but not limited to wholesalers and retailers such as Hy-Vee, Affiliated Foods Midwest, and Super Valu. These wholesalers and retailers have a distribution foot print through Minnesota, North Dakota, Iowa, South Dakota, Nebraska, the Upper Peninsula of Michigan, and Wisconsin, which is the same general distribution footprint of Bernatello's BREW PUB. (Schultz Decl., ¶ 61.)

88. A Topco sell sheet (distributed through Affiliated Foods Midwest) related to BREW TIME states:

The Brew Time brand was developed exclusively for Topco and our members by Hansen Foods (Green Bay, WI) as a private brand solution for what has recently emerged as a very popular & rapidly growing segment with the pizza category- the Brew Pub Style! Per IRI, the leading national brand, Lotza Mozza [sic], is 130% up in sales over the same period last year, and is expected to grow even more in 2016. Like the brand, our Brew Time pizzas claim ½ pound of real cheese and are heavily topped with premium ingredients. The Brew Time brand can offer your customers a more affordable private brand alternative that delivers the same high quality pizza that is just as capable of inducing a cheese coma.

(Schultz Decl., ¶ 62 & Ex. R.)

89. The Topco sell sheet shows that BREW TIME will be distributed from a warehouse in Kenosha to be shipped March 19, 2016. (Schultz Decl., ¶ 62 & Ex. R.)

90. Bernatello's saw, for the first time on January 13, 2016, that Hansen actually provided BREWHAUS branded frozen pizzas to grocery stores. (Schultz Decl., ¶ 51 & Ex. O.)

91. On December 30, 2015, Bernatello's became aware that Hansen was also selling a BREW TIME frozen pizza product. (Schultz Decl., ¶ 56 & Ex. Q.)

92. Recently, Hansen filed a U.S. Intent to Use Trademark Application for the marks BREWHAUS as applied to pizzas (Application Serial No. 86/844,156). (Declaration of Elijah Van Camp ("Van Camp Decl."), ¶ 1).

93. Hansen's BREWHAUS and BREW TIME pizzas are expected to be sold in the same stores and geographic areas that Bernatello's BREW PUB pizza is currently sold. (Schultz Decl., ¶ 64.)

94. Hansen's BREWHAUS and BREW TIME pizzas will be competing in the same market as Bernatello's BREW PUB frozen pizza, and targeting the same consumers based on their similar name, price, packaging, and quality and quantity of ingredients. (Schultz Decl.,

¶ 65.)

95. Prior to Hansen's adoption of the BREWHAUS and BREW TIME brands, Bernatello's enjoyed exclusive sales in the Midwest, since at least October of 2012, of frozen pizzas in the super-premium category selling under any trademark beginning with BREW in its mark. (Schultz Decl., ¶¶ 10, 26; Jacobsen Decl., ¶ 24; Alden Decl., ¶ 13; Gaetz Decl., ¶ 16.)

96. Bernatello's has spent over \$3.9 million on advertising and marketing its BREW PUB pizza, and as a result, the BREW trademarks have become well known among consumers as originating with Bernatello's. (Schultz Decl., ¶¶ 31-33 & Ex. F; Alden Decl., ¶ 14.)

97. BREWHAUS pizza will confuse or is likely to confuse customers into believing the BREWHAUS product is somehow associated with the BREW PUB product, and customers may mistakenly purchase a BREWHAUS pizza thinking it is a BREW PUB pizza, or vice versa. (Alden Decl., ¶¶ 18, 22.)

98. Hansen's BREWHAUS and BREW TIME brand names are expected to confuse consumers into believing they are purchasing Bernatello's BREW PUB products from the same source. (Alden Decl., ¶ 22; Jacobsen Decl., ¶¶ 27-29; Gaetz Decl., ¶ 17.)

99. It is expected that to the average consumer, Hansen's BREWHAUS and BREW TIME branded frozen pizza products appear to be virtually indistinguishable from Bernatello's BREW PUB frozen pizzas when displayed in grocery stores or convenience stores. (Schultz Decl., ¶¶ 51-53, 56-58, 65; Alden Decl., ¶ 22; Jacobsen Decl., ¶¶ 27-29; Gaetz Decl., ¶ 17.)

100. A grocery store manager familiar with Bernatello's BREW PUB brand pizzas has expressed concern that there will be confusion if Hansen's BREWHAUS and BREW TIME pizzas are offered for sale in their stores. (Alden Decl., ¶ 22.)

101. At least one grocery store has even refused to carry Hansen's BREWHAUS pizza

for fear of customer, and even employee, confusion with Bernatello's BREW PUB pizza. (Alden Decl., ¶¶ 22-24.)

102. Trig's is a full-service grocery store with locations throughout northern and central Wisconsin. (Alden Decl., ¶ 3.)

103. Trig's has sold Bernatello's BREW PUB frozen pizza since it was first introduced in November of 2012. (Alden Decl., ¶ 8.)

104. BREW PUB was seen as a fresh and creative offering to Trig's frozen pizza products. (Alden Decl., ¶ 8.)

105. In 2015, Trig's sold 109,934 units of BREW PUB pizza, making it the number one frozen pizza sold in Trig's stores. (Alden Decl., ¶ 12.)

106. Trig's also carries pizzas manufactured by Hansen such as PEP'S frozen pizzas. (Alden Decl., ¶ 17.)

107. On January 8, 2016, Alan Alden, Trig's Vice President of Sales, received an email from Cindy Egnarski, Hansen's sales representative, to explain that Hansen was rebranding its PEP'S BIG BEN frozen pizza line to be called BREWHAUS. (Alden Decl., ¶ 18.)

108. Ms. Egnarski attached a sell sheet to her email depicting several BREWHAUS frozen pizza varieties. (Alden Decl., ¶ 18 & Ex. A).

109. After receiving and reviewing a sample of Hansen's BREWHAUS pizza, Mr. Alden believes Hansen's BREWHAUS pizza would confuse Trig's customers into believing the BREWHAUS pizza was somehow associated with Bernatello's BREW PUB pizza. (Alden Decl., ¶ 22.)

110. Mr. Alden believes that customers may mistakenly purchase a BREWHAUS pizza thinking it to be a BREW PUB pizza, or vice versa. (Alden Decl., ¶ 22.)

111. Further, Mr. Alden believes that carrying both BREWHAUS and BREW PUB pizzas at Trig's would result in internal confusion for employees. (Alden Decl., ¶ 23.)

112. The pizza brands are so similar Mr. Alden is concerned employees may place the wrong pizza on the other brand's shelf position or confuse product promotions between BREWHAUS and BREW PUB leading to checkout delays, overall confusion, and inefficiency. (Alden Decl., ¶ 23.)

113. Due to this chance of customer and employee confusion, Trig's has decided not to carry or distribute Hansen's BREWHAUS pizza. (Alden Decl., ¶ 24.)

114. Coborn's operates over 120 grocery and convenience stores through the Midwest region. (Gaetz Decl., ¶ 3.)

115. Michael Gaetz, the Senior Category Manager at Coborn's, who has worked at Coborn's for over 44 years is responsible for ordering frozen pizza products and managing and arranging the stores' shelves for frozen pizza displays. (Gaetz Decl., ¶ 6.)

116. Coborn's carries Bernatello's BREW PUB tavern style frozen pizza. (Gaetz Decl., ¶ 10.)

117. On or about December 29, 2015, Mr. Gaetz received notice that a new tavern style frozen pizza branded BREW TIME would soon become available for Coborn's stores. (Gaetz Decl., ¶¶ 8 & 9.)

118. The product specifications of BREW TIME showed that it was in the same super-premium category and carried a similar label as Bernatello's BREW PUB frozen pizza. (Gaetz Decl., ¶ 12.)

119. Based on Mr. Gaetz's awareness and dealing with Bernatello's BREW PUB pizza, he asked Trent Midas, District Manager for Bernatello's, if the new BREW TIME pizza

was associated with Bernatello's. (Gaetz Decl., ¶ 11.)

120. On December 29, 2015, Mr. Gaetz sent an e-mail message to Mr. Midas asking for a meeting to go over the shelf layouts and logistics of carrying six varieties of the BREW TIME pizzas. (Gaetz Decl., ¶ 13 & Ex. A.)

121. It was not until Mr. Gaetz talked with Mr. Midas that he learned BREW TIME was not associated with Bernatello's BREW PUB. (Gaetz Decl., ¶ 14.)

122. Mr. Gaetz believes there is a reasonable probability that some customers will mistakenly purchase Hansen's BREW TIME pizza thinking it is Bernatello's BREW PUB pizza, or vice versa. (Gaetz Decl., ¶¶ 5 & 17.)

Dated this 15th day of February, 2016.

DEWITT ROSS & STEVENS S.C.

By: /s Harry E. Van Camp
Harry E. Van Camp (SBN: 1018568)
Craig Fieschko (SBN: 1019872)
Elijah B. Van Camp (SBN: 1100259)
Two East Mifflin Street, Suite 600
Madison, WI 53703-2865
608-255-8891
hvc@dewittross.com
cf@dewittross.com
evc@dewittross.com

**ATTORNEYS FOR PLAINTIFF,
BERNATELLO'S PIZZA, INC.**